



The Becket Fund  
FOR RELIGIOUS LIBERTY

October 27, 2014

**Submitted electronically**

Secretary Thomas E. Perez  
U.S. Department of Labor  
Office of Health Plan Standards and Compliance Assistance  
Employee Benefits Security Administration  
Room N-5653  
200 Constitution Avenue NW.  
Washington, DC 20210

Attention: Preventive Services

Dear Secretary Perez:

We write in response to your request for comments on the Interim Final Rule entitled Coverage of Certain Preventive Services Under the Affordable Care Act (79 Fed. Reg. 51092 (Aug. 27, 2014)).

The Becket Fund is a nonprofit, nonpartisan, public interest law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund takes no position on the morality of any particular drug or procedure covered under the HHS mandate (“Mandate”).<sup>1</sup> Instead, it focuses on the right of each person to follow his or her conscience, and the corollary right to join together with others to form organizations which reflect shared and deeply held beliefs.

The Becket Fund has repeatedly objected to the Mandate’s violation of conscience. Seven months before the Mandate was adopted, the Becket Fund warned that a broad contraceptive mandate would conflict with conscience rights.<sup>2</sup> The Becket Fund has protested against your Department’s unduly narrow definition of “religious employers,” and pointed out the ways that the previous accommodation failed to relieve the Mandate’s substantial burden

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<sup>1</sup> By “Mandate,” we mean the requirement that health insurance plans cover all FDA-approved contraceptive methods (including embryo-destroying drugs such as *ella* and Plan B), sterilization procedures, and patient education and counseling. See U.S. Dep’t of Health and Human Servs., Health Resources and Servs. Admin., Women’s Preventive Servs. Guidelines, <http://www.hrsa.gov/womensguidelines/> (last visited Oct. 27, 2014).

<sup>2</sup> Eric N. Kniffin, The Becket Fund, Remarks to IOM Committee on Preventative Services for Women, January 12, 2011.

on religious objectors.<sup>3</sup> When it became clear that these comments were falling on deaf ears, the Becket Fund was the first organization to challenge the Mandate in court.<sup>4</sup> Today, the Becket Fund represents clients in nine separate lawsuits challenging the Mandate.<sup>5</sup>

You have already received our prior comments submitted on September 30, 2011, June 15, 2012, and April 8, 2013. We reincorporate those comments by reference here and make the additional comments below.

*First*, the Interim Final Rule does not relieve the burden on the religious objectors who have challenged the Mandate. It is merely an alternative way for them to do what their religion forbids: comply with the Mandate and facilitate the distribution of contraceptives in conjunction with their benefits plan. *See* 79 Fed. Reg. at 51092. The “augment[ed]” rules have the same goal as the old rules—“preserving participants’ and beneficiaries’ . . . access to coverage for the full range of Food and Drug Administration (FDA)-approved contraceptives.” *Id.* Indeed they were rushed into effect without notice and comment because the government wants to provide “access to contraceptive coverage” without cost-sharing “as soon as possible.” *Id.* at 51095-96. And the new rules have the same effect as the prior rules: “[r]egardless of whether the eligible organization self-certifies in accordance with the July 2013 final rules, or provides notice to HHS in accordance with the August 2014 [Interim Final Rules], the obligations of insurers and/or TPAs regarding providing or arranging separate payments for contraceptive services are the same.”<sup>6</sup> In short, the Interim Final Rule has not relieved the burden on religious organizations that object to the Mandate.

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<sup>3</sup> Letter from The Becket Fund to HHS re: Interim Final Rules on Preventive Services (September 30, 2011) available at <http://www.becketfund.org/wp-content/uploads/2011/09/BF-Comments-to-HHS-on-Contraception-Mandate-9-30-11.pdf>; Letter from the Becket Fund to HHS re: Advance Notice of Proposed Rulemaking on Preventive Services (June 15, 2012) (“Becket Fund ANPRM Letter”), available at <http://www.becketfund.org/wp-content/uploads/2012/06/hhs-comments-on-anpr-final.pdf>; Letter from the Becket Fund to HHS re: Notice of Proposed Rulemaking on Preventive Services (April 8, 2013) (“Becket Fund NPRM Letter”), available at <http://www.becketfund.org/wp-content/uploads/2013/04/Becket-Fund-4-8-13.pdf>.

<sup>4</sup> *Belmont Abbey College v. Sebelius*, No. 11-CV-1989 (D.D.C.) (filed Nov. 10, 2011).

<sup>5</sup> The Becket Fund, Our Cases, <http://www.becketfund.org/u-s-litigation/our-cases/> (last visited Oct. 27, 2014). The Becket Fund’s cases include *Burwell v. Hobby Lobby*, *East Texas Baptist University and Houston Baptist University v. Burwell*, *Wheaton College v. Burwell*, *Ave Maria University v. Burwell*, *Eternal Word Television Network v. Burwell*, *Colorado Christian University v. Burwell*, *Belmont Abbey College v. Burwell*, and the class actions *Little Sisters of the Poor v. Burwell* and *Reaching Souls International v. Burwell*. *See id.*

<sup>6</sup> The Center for Consumer Information & Insurance Oversight, Fact Sheet, <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/womens-preven-02012013.html> (last visited Oct. 27, 2014) (“CCIIO Fact Sheet”).

*Second*, the Interim Final Rule continues your Department’s explicit discrimination against certain religious institutions “expressly based on the degree of religiosity of the institution[s] and the extent to which that religiosity affects [their] operations.” *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008); *see also* 78 Fed. Reg. at 39874. The Interim Final Rule did nothing to cure the fact that this open discrimination is based in “mere speculation” about the religious beliefs of non-exempt religious organizations and their employees. Such speculation “cannot support a compelling interest.” *Compare Awad v. Ziriak*, 670 F.3d 1111, 1130 (10th Cir. 2012) (noting that, to pass strict scrutiny under *Larson v. Valente*, 456 U.S. 228 (1982), the government must provide “evidence” proving a challenged law’s necessity) *with* Cohen Dep. Trans. at 34:9-24, *Roman Catholic Archdiocese of N.Y. v. Sebelius*, Doc. 51-1, No. 1:13-cv-00303 (E.D.N.Y. Nov. 12, 2013) (Deposition Transcript of Gary M. Cohen, Defendants’ Rule 30(b)(6) Designee, Director of the Center for Consumer Information and Insurance Oversight in the Centers for Medicare and Medicaid Services) (admitting that there is “no evidence” to support the government’s speculation about the beliefs of those employed by exempt religious organizations). Your Department has never explained why it is reasonable to exempt churches based on the admittedly speculative conclusion that their employees are likely to agree with their mission, while burdening other religious non-profits—many of whom have express belief and conduct policies for their employees—with the accommodation.

The Becket Fund continues to urge your Department to adopt a rule that respects the conscience rights of all religious organizations equally.

Sincerely,

s/ Mark L. Rienzi

Mark L. Rienzi

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